JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-523

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CONTAINER CORPORATION OF AMERICA,
Appellant,
v.
FRANCHISE TAX BOARD,
Appellee.

On Appeal from the Court of Appeal of the State of California for the First Appellate District

---

BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AS AMICUS CURIAE

LLOYD N. CUTLER *
WILLIAM T. LAKE
ROBERT M. POZIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for the Government of the Kingdom of the Netherlands as Amicus Curiae

July 30, 1982

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. APPLICATION OF THE COMBINATION AND APPORTIONMENT METHOD PLACES FAR GREATER BURDENS ON A FOREIGN-BASED ENTERPRISE THAN ON A U.S.-BASED ENTERPRISE	6
II. A STATE'S APPLICATION OF THE COMBINATION AND APPORTIONMENT METHOD TO A NETHERLANDS-BASED ENTERPRISE RAISES QUESTIONS UNDER THE NETHERLANDS FCN TREATY THAT ARE NOT PRESENTED BY ITS APPLICATION TO A U.S.-BASED ENTERPRISE	8
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

ASARCO Inc. v. Idaho State Tax Commission, 50 U.S.L.W. 4962 (U.S. June 29, 1982) 4, 6

Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., No. 81-349 (U.S.) 5

Deutsche Lufthansa AG v. City of New York, 85 Misc.2d 719, 379 N.Y.S.2d 635 (N.Y. Sup. Ct. 1976), *aff'd*, 57 A.D.2d 533, 393 N.Y.S.2d 683 (N.Y. App. Div. 1977) 10

Edgar v. Mite Corp., 50 U.S.L.W. 4767 (U.S. June 23, 1982) 5

EMI Ltd. v. Bennett, No. 80-4114 (9th Cir. Feb. 16, 1982) 2

F.W. Woolworth Co. v. Taxation & Revenue Department, 50 U.S.L.W. 4957 (U.S. June 29, 1982) 4, 6

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) 4

Nielsen v. Johnson, 279 U.S. 47 (1929) 10

Shell Petroleum N.V. v. Graves, Civil No. C 81 4302 (MHP) (pending N.D. Cal.) 2, 7, 8

Sumitomo Shoji America, Inc. v. Avagliano, 50 U.S.L.W. 4643 (U.S. June 15, 1982) 8, 9

TREATIES:

Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625 12

Convention with Respect to Taxes on Income and Certain Other Taxes, Apr. 29, 1948, United States-Netherlands, 62 Stat. 1757, T.I.A.S. No. 1855, *amended by* Supplementary Convention, Dec. 30, 1965, United States-Netherlands, 17 U.S.T. 896, T.I.A.S. No. 6051 11

Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 9

Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683 9

TABLE OF AUTHORITIES—Continued

Page

Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 ..... 1, 8-12

OTHER:

Bureau of Economic Analysis, United States Department of Commerce, 61 *Survey of Current Business* 40-51 (Aug. 1981, No. 8) 2

Deperon, *International Double Taxation* (1945) 7

League of Nations Fiscal Comm., *London and Mexico Model Tax Conventions*, League of Nations Doc. C.88.M.88.1946.II.A. (1946) 11

Memorandum for the United States as Amicus Curiae, *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349 (U.S. Jan. 14, 1982) ..3, 11, 12

Report of the OECD Comm. on Fiscal Affairs, *Draft Double Taxation Convention on Income and Capital*, OECD Doc. C(63)87 (1963) 11

Report of the OECD Comm. on Fiscal Affairs, *Model Double Taxation Convention on Income and on Capital* (1977) 11

State Taxation of Foreign Source Income: Hearing on H.R. 5076 Before the Comm. on Ways and Means of the House of Representatives, 96th Cong., 2d Sess. 308-16 (1980) 2

United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, U.N. Doc. ST/ESA/102 (1980) 11

U.S. Draft Model Income Tax Treaty, [1 Tax Treaties] Fed. Taxes (P-H) ¶ 1022 (June 16, 1981) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-523

CONTAINER CORPORATION OF AMERICA,
Appellant,

v.

FRANCHISE TAX BOARD,
Appellee.

On Appeal from the Court of Appeal of the State of California for the First Appellate District

---

BRIEF OF THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Government of the Kingdom of the Netherlands is party to a Treaty of Friendship, Commerce and Navigation with the United States of America (the "Netherlands FCN Treaty")[1] that limits, *inter alia*, the methods of taxation that a state of the United States may apply to nationals and companies of the Netherlands engaged in trade, through subsidiaries or otherwise, within the state. Netherlands enterprises protected by the treaty constitute the largest single source of foreign direct investment

---

[1] Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

in the United States.[2] The Netherlands Government therefore has an important, substantial and direct interest in state taxation of multinational businesses.

This appeal presents the question whether California, consistently with the Foreign Commerce Clause and the Due Process Clause of the Constitution, may apply its worldwide combination and apportionment method of taxation to the combined income of appellant, a U.S. parent corporation, and its "downstream" subsidiaries organized and operating solely in foreign countries.[3] This appeal does not present the quite different question whether California or other states may apply such a method to the combined income of a U.S. subsidiary corporation, its "upstream" foreign parent company, and the foreign parent's subsidiaries in other countries. The Netherlands Government has filed a brief amicus curiae in one such case in which the State of California is attempting to apply its combination and apportionment method in this latter manner to the combined incomes of one wholly owned and one partly owned U.S. subsidiary, their Netherlands parent, and the parent's more than 900 other affiliate companies worldwide.[4] The Netherlands Government believes that California and other states may seek to apply that method in the future to additional enterprises protected by the Netherlands FCN Treaty.

The combination and apportionment method burdens a foreign parent more than a domestic parent, as demon-

---

[2] *See State Taxation of Foreign Source Income: Hearing on H.R. 5076 Before the Comm. on Ways and Means of the House of Representatives*, 96th Cong., 2d Sess. 308-16 (1980) (statement of counsel for Dutch Employers' Federation); Bureau of Economic Analysis, United States Department of Commerce, 61 *Survey of Current Business* 40-51 (Aug. 1981, No. 8).

[3] Jurisdictional Statement at i (U.S. Sept. 14, 1981).

[4] *See Shell Petroleum N.V. v. Graves*, Civil No. C 81 4302 (MHP) (cross-motions for summary judgment and dismissal argued N.D. Cal. June 1, 1982). California is also applying the same method to companies of other trading partners of the United States. *See, e.g., EMI Ltd. v. Bennett*, No. 80-4114 (9th Cir. Feb. 16, 1982) (remanding to district court) (United Kingdom).

strated below, and therefore raises even more difficult issues than those presented on this appeal. Moreover, it violates treaty rights that a Netherlands parent, as distinct from a U.S. domestic parent, enjoys against unreasonable state taxation—rights granted by the United States in exchange for equivalent rights granted by the Netherlands against Netherlands taxation of U.S. parent firms. The Netherlands Government files this brief to inform the Court of these extra burdens and separate treaty issues, which were not addressed by the parties or the courts below, and to urge the Court, in the event that it upholds application of the combination and apportionment method to a U.S. parent company, to reserve judgment on the permissibility of extending that method to parent companies of the Netherlands and other foreign countries.[5]

SUMMARY OF ARGUMENT

Application of the worldwide combination and apportionment method to a foreign-based enterprise is even more burdensome than its application to a U.S.-based enterprise. When applied to a foreign-based enterprise, the method taxes income of the foreign parent that has already been taxed by other nations. Moreover, the method distorts results more severely and imposes much greater burdens of compliance when applied to a foreign-based rather than a U.S.-based enterprise.

When applied to a Netherlands-based enterprise, the worldwide combination and apportionment method vio-

---

[5] It may be noted that, according to the U.S. Government, application of the combination and apportionment method to U.S.-based companies with foreign subsidiaries, as well as to foreign-based enterprises, violates the Commerce Clause. *See* Memorandum for the United States as Amicus Curiae at 16-18, *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349 (U.S. Jan. 14, 1982). However, the Netherlands Government limits its discussion in this brief to the special considerations involved where that method is applied to foreign-based enterprises.

lates the Netherlands FCN Treaty. That treaty adopts the internationally accepted principle that a taxing authority may not apply an apportionment formula to the combined income of a domestic subsidiary, its foreign parent, and the parent's affiliate companies abroad. The serious questions of treaty interpretation presented by such taxation deserve full consideration and should not be foreclosed by an unnecessarily broad ruling in this case, which involves only the taxation of a U.S. parent company not entitled to the protections of the Netherlands FCN Treaty.

ARGUMENT

In recent cases involving application of state "unitary" tax methods to enterprises based in the United States, this Court has considered the increasingly imaginative efforts of certain states to widen the net by which income derived in foreign countries can be caught and included in the tax base to which a state apportionment formula is applied.[6] This case calls into question the broadest application of the state unitary tax concept considered by the Court thus far: an attempt to include in the taxpayer's apportionment base—and thus subject to tax—the income earned by its foreign subsidiaries, but not

---

[6] *See F.W. Woolworth Co. v. Taxation & Revenue Department*, 50 U.S.L.W. 4957 (U.S. June 29, 1982) (striking down inclusion in taxpayer's apportionment base of dividends received from foreign subsidiaries constituting discrete business enterprises from parent and "gross-up" not so received but deemed received by federal government); *ASARCO Inc. v. Idaho State Tax Commission*, 50 U.S.L.W. 4962 (U.S. June 29, 1982) (invalidating inclusion of interest payments from foreign subsidiaries having no other connection with the state and of capital gains from sale of stock in such subsidiaries); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) (upholding inclusion of dividends received from foreign subsidiaries whose operations were functionally integrated with those of parent).

repatriated to the U.S. parent in the form of dividends or similar payments.[7]

An even broader effort to apply the unitary method—to catch and tax the income earned abroad by *foreign* parent companies and their non-U.S. subsidiaries—has not yet reached the Court, but, as noted above, is now pending in the district courts.[8]

The latter application merits separate consideration because it conflicts directly with the internationally accepted principle, recognized by the U.S. Government in numerous treaties, that a taxing authority must calculate the income of a domestic subsidiary on a basis separate from its foreign parent, adjusting the accounts of the subsidiary only if necessary to reflect transactions between the two that were on other than "arm's length" terms. Under this international consensus, a taxing authority must not combine the income of the subsidiary with the parent's income or treat it as part of a single, "unitary" business, whether or not the subsidiary may be considered functionally integrated with the parent. A state's failure to comply with this principle violates reciprocal rights that the U.S. Government has extended to companies of its trading partners, under treaties ratified with the advice and consent of the Senate, in return for comparable protections of American enterprises abroad. A state's contrary conduct "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[9] because it impairs the ability

---

[7] The same question is presented on a less fully developed record in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349. In *F.W. Woolworth* the Court held that "gross-up" not received by the taxpayer was not includible in its apportionment base.

[8] *See* note 4 *supra*.

[9] *Cf. Edgar v. Mite Corp.*, 50 U.S.L.W. 4767, 4768 (U.S. June 23, 1982) (plurality opinion) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

of the U.S. Government to guarantee full reciprocity for the protections extended to American companies and fully honored by its treaty partners.

I. APPLICATION OF THE COMBINATION AND APPORTIONMENT METHOD PLACES FAR GREATER BURDENS ON A FOREIGN-BASED ENTERPRISE THAN ON A U.S.-BASED ENTERPRISE

Application of the combination and apportionment method to the worldwide income of a foreign-based enterprise having a U.S. subsidiary is more burdensome than application of such a method to a U.S.-based parent company such as appellant in at least three respects. First, unlike an American parent, a U.S. subsidiary of a foreign parent company has not even an indirect right to the foreign income included in its apportionment base and taxed by the state. When a state includes in the apportionment base of a U.S. subsidiary the income earned from wholly foreign sources by its "upstream" foreign parent and the parent's other subsidiaries, it taxes income that the U.S. subsidiary never receives and has no power to repatriate. In effect, the state is "reaching out" to tax income of the foreign parent that has already been taxed in other jurisdictions and "to which [the state] contribute[s] nothing." [10]

Second, combination and apportionment in a foreign-parent situation leads to a greater distortion in results. The three-factor formula used by the State of California is based on the assumption that the in-state payroll, property, and sales of a "unitary" enterprise produce the same yield as its payroll, property, and sales in all economies throughout the world, an assumption that is demonstrably false.[11] Application of that formula in *any* trans-

---

[10] *See F.W. Woolworth Co. v. Taxation & Revenue Department*, 50 U.S.L.W. 4957, 4961-62 (U.S. June 29, 1982).

[11] *Cf., e.g., ASARCO Inc. v. Idaho State Tax Commission*, 50 U.S.L.W. 4962, 4971 (U.S. June 29, 1982) (O'Connor, J., dissenting) ("economic conditions in Australia and Mexico do not track those in the United States").

national situation inevitably leads to results "less true" than those that would be derived from the use of the internationally accepted arm's length principle.[12] But because a foreign-based firm is likely to carry on a greater percentage of its total operations in economies outside the United States than an American-based firm,[13] applying such a formula to the foreign-based enterprise will produce even greater distortions than applying it to an American-based enterprise.

Third, compliance with state reporting requirements is far more onerous for a foreign-based enterprise. An American parent, by virtue of its U.S. domicile, keeps its books of account in U.S. dollars and in accordance with American accounting principles. To comply with a state's unitary reporting requirements, that parent must convert the accounts of its foreign subsidiaries to U.S. dollars only once, a procedure it would follow in any event if it prepares consolidated financial statements. However, a foreign parent with subsidiaries in third countries must make multiple sets of adjustments and conversions: it must first convert the accounts of its foreign subsidiaries to comply with the tax laws of its country of domicile, and then reformulate those as well as its own accounts to translate them into U.S. dollars and comply with the accounting principles of the state employing the combination and apportionment method. The complications induced by the need to adjust for differences in national accounting practices and fluctuations in currency exchange rates are thus multiplied in the case of a foreign parent. To the extent that different states require different accounting methods, the foreign parent

---

[12] *See* Deperon, *International Double Taxation* 25 (1945).

[13] For example, in *Shell Petroleum N.V. v. Graves*, Civil No. C 81 4302 (MHP) (argument N.D. Cal. June 1, 1982), the Netherlands parent company, aside from its two U.S. subsidiaries, had over 900 other subsidiaries operating in over 100 other countries. Complaint ¶ 7.

may be forced to repeat the reformulation and conversion process numerous times. In addition, compliance with the information demands asserted by a taxing state requires the foreign parent to gather and supply volumes of information regarding transactions having no nexus at all with the domestic subsidiary's activities within the state.[14] Compliance becomes especially burdensome when the state retroactively requires information and reconstruction of accounts for tax periods that expired several years before the commencement of the audit. At best the information is stale; at worst, it may be unavailable because the nation of domicile may no longer require the retention of records at the time the state's audit begins.

These three increased burdens—of extraterritorial double taxation, distortion and compliance—raise serious constitutional questions beyond those presented in this case. When imposed on a Netherlands-based enterprise, these burdens also infringe the protections of the Netherlands FCN Treaty.

II. A STATE'S APPLICATION OF THE COMBINATION AND APPORTIONMENT METHOD TO A NETHERLANDS-BASED ENTERPRISE RAISES QUESTIONS UNDER THE NETHERLANDS FCN TREATY THAT ARE NOT PRESENTED BY ITS APPLICATION TO A U.S.-BASED ENTERPRISE

As this Court noted last Term, the Netherlands FCN Treaty is "one of a series of similar commercial agreements negotiated after World War II." [15] Article XI(4)

---

[14] For example, in *Shell Petroleum N.V. v. Graves*, Civil No. C 81 4302 (MHP) (N.D. Cal.), the State of California demanded from Shell Oil Company a listing of every crude oil transaction between any of the more than 900 worldwide subsidiaries of the Netherlands parent company. *See* Complaint ¶¶ 23, 25 (N.D. Cal. Nov. 4, 1981); Kennedy Aff., Ex. 1 (N.D. Cal. Feb. 25, 1982).

[15] *Sumitomo Shoji America, Inc. v. Avagliano*, 50 U.S.L.W. 4643, 4646 & n.13 (U.S. June 15, 1982).

of that treaty, which has counterparts in other U.S. FCN treaties,[16] provides in pertinent part:

> "In the case of companies . . . of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories . . . ."[17]

As its wording suggests, this provision was intended to protect American enterprises against excessive taxation within the Netherlands, in exchange for comparable protection of Netherlands enterprises against unreasonable taxation by the United States or its political subdivisions.[18] While this treaty provision does not affect a state's power to tax U.S.-based multinationals such as ap-

---

[16] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. XI(4), 4 U.S.T. 2063, 2072, T.I.A.S. No. 2863; Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, art. XI(4), 12 U.S.T. 110, 116, T.I.A.S. No. 4683. The Netherlands Government recognizes that these treaties, "although similarly worded, may have different negotiating histories," *Sumitomo Shoji America, Inc. v. Avagliano*, 50 U.S.L.W. 4643, 4646 n.12 (U.S. June 15, 1982), and therefore, except where indicated, expresses no view on the interpretation of treaties other than the Netherlands FCN Treaty.

[17] 8 U.S.T. at 2061.

[18] Two additional provisions of the treaty govern more generally the treatment of Netherlands enterprises by governmental authorities within the United States, and thus affect their taxing power. Article I(1) requires that such authorities "at all times accord fair and equitable treatment to the nationals and companies of the [Netherlands], and to their property, enterprises and other interests." Article VI(3) forbids such authorities to impose "unreasonable or discriminatory measures that would impair the rights or interests [within the United States] of nationals and companies of the [Netherlands], whether in their capital, or in their enterprises and the property thereof." 8 U.S.T. at 2045, 2051.

pellant, which are protected against such taxation by the Constitution, it does constrain the states in taxing Netherlands-based enterprises and is therefore implicated by the application of the combination and apportionment method to such enterprises.[19]

The Netherlands Government contends that the Netherlands FCN Treaty forbids a state to tax a U.S. subsidiary of a Netherlands parent under a formula that includes in the subsidiary's apportionment base the "upstream" income of the parent and the parent's other affiliates around the world that is never received, directly or indirectly, by the subsidiary.[20] Such "upstream" combination and apportionment is contrary to the treaty for three reasons. First, the treaty was negotiated against the background of the internationally accepted principle that a domestic subsidiary is to be treated as an independent enterprise from its foreign parent, and that its income is to be determined on the basis of its separate accounts as adjusted to account for any transactions with the parent not made on arm's length terms. This principle has been endorsed in the model double taxation conventions of in-

---

[19] U.S. commercial treaties in general, *see, e.g., Nielsen v. Johnson*, 279 U.S. 47 (1929), and the tax articles of modern FCN treaties in particular, *see Deutsche Lufthansa AG v. City of New York*, 85 Misc. 2d 719, 379 N.Y.S.2d 635 (N.Y. Sup. Ct. 1976), *aff'd*, 57 A.D.2d 533, 393 N.Y.S.2d 683 (N.Y. App. Div. 1977) (West German FCN Treaty), limit the taxing power of subnational as well as national governments.

[20] The Netherlands Government does not contend that the treaty forbids a state to include in the U.S. subsidiary's apportionment base the incomes of that subsidiary's own "downstream" subsidiaries outside the United States. The treaty does not address the tax treatment of a U.S. corporation with respect to its foreign subsidiaries. Such "downstream" application of the combination and apportionment method does not implicate the treaty, although, as noted above, the U.S. Government argues that it violates the Commerce Clause of the U.S. Constitution. *See* note 5 *supra*.

ternational organizations from 1928 to the present [21] and embodied in the double taxation treaties of most nations, including the United States.[22] Second, during the negotiation of the FCN Treaty, the Netherlands negotiators were informed by the American representatives that Article XI was consistent with the existing tax treaty between the two countries, which had specifically adopted this principle.[23]

Third, by virtue of the unconditional most-favored-nation treatment guaranteed by Article XI(3) of the Netherlands FCN Treaty,[24] Netherlands companies may

---

[21] *See, e.g.*, United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, arts. 7(2), 9(1), U.N. Doc. ST/ESA/102 (1980); Report of the OECD Comm. on Fiscal Affairs, *Model Double Taxation Convention on Income and on Capital*, arts. 5(7), 7(1), 7(2), 9(1) (1977); Report of the OECD Comm. on Fiscal Affairs, *Draft Double Taxation Convention on Income and Capital*, arts. 5(6), 7(1), 7(2), 9, OECD Doc. C(63)87 (1963); League of Nations Fiscal Comm., *London and Mexico Model Tax Conventions*, League of Nations Doc. C.88.M.88.1946.II.A. (1946).

[22] *See* Memorandum for the United States as Amicus Curiae at 2, *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349 (U.S. Jan. 14, 1982); U.S. Draft Model Income Tax Treaty, arts. 7, 9, [1 Tax Treaties] Fed. Taxes (P-H) ¶ 1022 (June 16, 1981). U.S. double taxation treaties apply to federal taxation only, except for their national treatment clauses. The FCN treaties apply in all respects to state as well as federal taxation. *See* note 19 *supra*.

[23] *See* Convention with Respect to Taxes on Income and Certain Other Taxes, Apr. 29, 1948, United States-Netherlands, arts. III-IV, 62 Stat. 1757, 1759-60, T.I.A.S. No. 1855. This principle was carried forward when the Convention was amended in 1965. *See* Supplementary Convention, Dec. 30, 1965, United States-Netherlands, arts. II-III, 17 U.S.T. 896, 899-900, T.I.A.S. No. 6051.

[24] Article XI(3) provides:

> "Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to in-

invoke the rights extended to companies of other countries by other U.S. commercial treaties. Article IX(4) of one such treaty, the Convention of Establishment between the United States of America and France,[25] expressly bars imposition of tax by reason of income derived from sources outside the taxing jurisdiction: "[French companies] shall not be subject, within the territories of the [United States], to any form of taxation upon capital, income, profits or any other basis, except by reason of the property which they possess within those territories, the income and profits derived from sources therein, the business in which they are there engaged, the transactions which they accomplish there, or any other bases of taxation directly related to their activities within those territories." [26]

The U.S. Government has recognized that application of the unitary method "may violate" the French Convention and "certain" other FCN treaties.[27] The Netherlands Government contends that the application of that method to a Netherlands-based enterprise violates the Netherlands FCN Treaty. In any event, the serious questions of treaty interpretation presented by such taxation deserve full consideration, and should not be foreclosed by the Court's decision on this appeal.

---

come, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country." 8 U.S.T. at 2060-61.

[25] Signed at Paris, Nov. 25, 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625.

[26] *Id.* at 2409-10.

[27] Memorandum for the United States as Amicus Curiae at 16-17, *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, No. 81-349 (U.S. Jan. 14, 1982).

CONCLUSION

Application of the combination and apportionment method of taxation to a foreign-based enterprise is more burdensome than its application to a U.S.-based enterprise. If the Court invalidates the inclusion of the income of appellant's foreign subsidiaries in its apportionment base, *a fortiori* the inclusion of a foreign parent's income in the apportionment base of its U.S. subsidiary would be forbidden. On the other hand, if the Court should uphold the tax treatment of appellant, it should reserve judgment on the serious constitutional issues that would nonetheless be posed by "upstream" combination reaching the income of a foreign parent.

In addition, "upstream" combination of the incomes of a U.S. subsidiary and a Netherlands parent raises serious questions of violation of the Netherlands FCN Treaty. The Netherlands Government urges the Court to confine any ruling in this case in a manner that will avoid unnecessarily prejudicing the consideration of those treaty issues in a subsequent case in which they are directly presented.

Respectfully submitted,

LLOYD N. CUTLER *
WILLIAM T. LAKE
ROBERT M. POZIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for the Government of the Kingdom of the Netherlands as Amicus Curiae

July 30, 1982

* Counsel of Record